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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73 - 1810

ROBERT ALEXANDER SMITH, et. al.,
Petitioners,

v.

INDIANA STATE BOARD OF HEALTH, et. al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Respondents (hereinafter referred to as the State of Indiana) consider Petitioners' (Promoters') statement of the Questions Presented to be inaccurate

and based on erroneous presupposition of law and fact. This Brief will be framed in response to that statement to demonstrate the absence of a substantial federal question.

STATEMENT OF THE CASE

The Promoter's Statement of the Case is accurate. However, further information as to the facts and legal proceedings is presented for purposes of clarity.

The "rock festival" which precipitated this litigation had been announced, as of the time of the inititation of the litigation, as being held at an unidentified location in Posey County, Indiana. The specific location was later announced as "Bull Island." This area is part of the State of Illinois, but because of a move-

ment of the channel of the Wabash River, which is the state boundary in that area, the only land access to the site is through Posey County, Indiana. The area is not developed to provide facilities necessary for a large gathering, e.g., highways, parking, food, water, sanitary facilities, and law enforcement. A temporary restraining order was obtained by state and local health and law enforcement agencies ordering that the festival not be held in that it would constitute a nuisance.

The rock festival was held despite the Court order. On the first morning of the three-day festival, the crowd was estimated at 70,000 persons, which number continuted to increase thereafter. A ticket booth was set up in Indiana. Cars were parked on and along the roads, forcing

the temporary closing of highway I-64 because of parked cars blocking the driving lanes. There was considerable damage to state and county roads as well as private property. Extra law enforcement personnel had to be called in from a large area of the state.

On the first day of the rock festival, a contempt citation was issued, which is not relevant to this action. A second contempt citation, which is the subject matter of the Petition for Writ of Certiorari, was filed after the festival was over. The trial court ruled that this was a civil rather than a criminal contempt action. Part of the penalty assessed was that the Promoters should reimburse the State of Indiana for its proven damages in the amount of $24,748.06 (reduced on

appeal to the Indiana Court of Appeals to $7,531.06) and reimburse Posey County for its proven damages in the amount of $6,571.35. The Promoters were ordered incarcerated until such payment was made, but that order was stayed pending appeal. The Promoters' petition for remission of fine was rejected.

ARGUMENT

I.

ALLEGATIONS OF INDIGENCY

The Promoters' argument as to the rejection of their petitions for remission of fine is based on this Court's rulings in Williams v. Illinois, 399 U.S. 235 (1970) and Tate v. Short, 401 U.S. 395 (1971),which are criminal cases. One distinction is that the contempt action here was civil and not criminal. That distinction is not necessary,

however, because as a matter of state law, a proven inability to comply with the order is grounds for discharge from incarceration in a civil contempt case. Perry v. Pernet, 165 Ind. 67 (1905), quoted by the Court of Appeals of Indiana in its opinion (Pet. A-17); Brown v. Brown, 205 Ind. 664 (1933).

The holding of the Indiana Court of Appeals was that the affidavits filed were insufficient to show inability to pay (Pet. A-18). Should a new order of commitment be issued, the Promoters would be entitled to file proper affidavits. Such new affidavits would be essential in any event because of the likelihood of changes in circumstances since September of 1972, inability to pay being grounds only for release from imprisonment and not from the fine or penalty itself.

The State of Indiana therefore submits that no substantial federal question is presented as to this issue.

II.

CIVIL AND CRIMINAL CONTEMPTS

The Promoters properly set out the standards under Indiana law as to the distinctions between civil and criminal contempt. Under that standard, this case is clearly one of civil contempt. The attempt to insert the indigency issue for the purpose of transmuting a civil contempt into a criminal one is a misstatement of the record, as discussed above.

Indeed it is not apparent that the distinction between civil and criminal contempts is at all material as a constitutional question. The terms are used in Indiana law to distinguish two classes of cases to which

different standards apply. No significant federal question is presented as to the issues presented in this case since they involve matters where there is no difference in standards between civil and criminal contempts.

III.

BURDEN OF PROOF

There is no question in this case of any "shifting" of the burden of proof in a criminal prosecution. Even if criminal standards are assumed arguendo to apply, the indigency question does not go to the elements of the offense. Rather it is in the nature of a collateral attack upon the enforcement of the penalty. Such an attack is analogous to a habeas corpus action. It is well established that the prisoner has the burden of proof in

such cases. See for example, 28 U.S.C. §2254(d).

IV.

INTERSTATE COMMERCE

It is not disputed that the federal government has the constitutional power to regulate interstate commerce. It is well established, though, that the states are not prohibited from the exercise of their police powers to the extent necessary to protect the health and safety of the citizenry even though there may be some incidental restraint on the flow of interstate commerce. See, for example, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). The abatement of nuisances is clearly within the police power of the states. In this case, the rock festival was enjoined as a health

hazard to those who attended and to the general public because of dangers of outbreak of infectious diseases and also as a safety hazard because the traffic congestion and great temporary increase in the population of the area would make the provision of fire, police, ambulance and other public services extremely difficult if not impossible. Therefore, any incidental restriction on interstate commerce was not unconstitutional.

V.

CIVIL RIGHT TO ENGAGE IN BUSINESS

The Promoters allege that one of the civil rights protected by 28 U.S.C.§1981 et seq is the right to engage in any business. That civil right must be recognized to be limited by the proper scope of the police power of the states.

Thus the argument above, as to the regulation of interstate commerce is also applicable here.

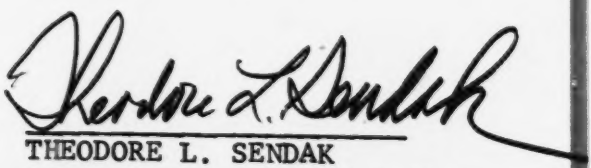
The freedom of religion guaranteed by the First Amendment, for example, is one of our most jealously guarded constitutional rights. Yet it has long been held that even this right must give way to proper and non-discriminatory state laws under the police power. Mormon Church v. United States, 136 U.S. 1(1890).

To make the right to engage in business absolute would require protection of such businesses as murder for hire, the slave trade, and narcotics trafficking. The use of the police power in this case was clearly proper, so as to present no substantial federal question.

CONCLUSION

For the foregoing reasons, the Respondents herein respectfully urges this Court to deny the Petition for Writ of Certiorari in this cause.

Respectfully submitted,



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